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No. 88-727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLOTTE BLUMBERG,

Petitioner,

vs.

HCA MANAGEMENT COMPANY, INC. and HOOD GENERAL HOSPITAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the failure of the Petitioner to assert at any time before filing her reply brief with the Court of Appeals that she was entitled to the extended 300-day period specified in the Age Discrimination in Employment Act, 29 U.S.C. § 626(d)(2), for filing a charge of employment discrimination with the Equal Employment Opportunity Commission precludes consideration of that issue.

2. Whether a charging party is barred from relying on the extended 300-day period for filing a charge of discrimination with the Equal Employment Opportunity Commission where she has not pursued her claims of age discrimination before the state deferral agency.

3. Whether the time period for filing a charge of employment discrimination with the Equal Employment Opportunity Commission is to be equitably tolled in the absence of any sort of misconduct by the employer where the charging party was aware of the facts upon which she relied in support of her *prima facie* case at the time of her discharge, where she had suspected that she was being discriminated against on account of her age even prior to her termination and where she ignored the advice of attorneys within the limitations period that she had to file a charge of discrimination in order to pursue her claims.

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit appear in the caption of the case in this Court.[1]

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[1] Pursuant to Supreme Court Rule 28, the following is a listing of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of HCA Management Company, Inc.: Hospital Corporation of America. Hood General Hospital has no parent company, subsidiaries or affiliates.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
I. The Relevant Facts	2
II. The Proceedings Below	3
REASONS FOR DENYING THE WRIT	5
I. Blumberg Forfeited Any Claim To The Extended 300-Day Period	5
II. Blumberg Failed To Satisfy The Conditions Precedent To Filing Suit In A Deferral State	7
III. No Equitable Tolling Of The Limitations Period Is Proper	9
CONCLUSION	10

TABLE OF AUTHORITIES

CITATIONS	Page(s)
Cornett v. AVCO Financial Services, 792 F.2d 447 (4th Cir. 1986)	9
Daggett v. Kimmelman, 811 F.2d 793 (3d Cir. 1987)	6
McCall v. Andrus, 628 F.2d 1185 (9th Cir. 1980), *cert. denied*, 450 U.S. 996 (1981)	6
McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936)	7
Mennor v. Fort Hood National Bank, 829 F.2d 553 (5th Cir. 1987)	4,5
Mississippi River Corp. v. Federal Trade Commission, 454 F.2d 1083 (8th Cir. 1972)	6
Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979)	8
Pignons S.A. de Mecanique v. Polaroid Corp., 701 F.2d 1 (1st Cir. 1983)	6
Smith v. General Scanning, Inc., 832 F.2d 96 (7th Cir. 1987)	9
United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981)	6
United States v. Bucchino, 606 F.2d 590 (5th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980)	6
United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977)	6
United States v. Oakley, 744 F.2d 1553 (11th Cir. 1984)	6
United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977)	6
Wright v. Holbrook, 794 F.2d 1152 (6th Cir. 1986)	6

Table of Authorities Continued

STATUTES	Page(s)
Age Discrimination in Employment Act	
29 U.S.C. § 626(d)	2
29 U.S.C. § 626(d)(1)	4,6
29 U.S.C. § 633(b)	2
Title VII of the 1964 Civil Rights Act	
42 U.S.C. § 2000e-5(e)	5

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, HCA Management Company, Inc. ("HMC") and Hood General Hospital (the "Hospital"), respectfully urge denial of the Petition for a Writ of Certiorari to review the judgment and order entered by the United States Court of Appeals for the Fifth Circuit on July 5, 1988.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

Certain provisions of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, are involved in this case. In particular, this case concerns 29 U.S.C. § 626(d) and 29 U.S.C. § 633(b). Those provisions are set forth at pp. 2-3 of the Petition.

STATEMENT OF THE CASE

I. The Relevant Facts

In September, 1977, when she was 57 years old, Charlotte Blumberg was hired by the Hospital. She worked as a nurse at the Hospital until her employment was terminated on August 3, 1983.

In June, 1983, after she had been counseled by her superiors concerning her job performance, Blumberg composed a letter to the Hospital concerning what she believed to have been unfair treatment. Although that letter was never actually sent to the Hospital, Blumberg admits that she considered herself to be a victim of age discrimination at least as early as the date of that letter, June 20, 1983.

Blumberg also concedes that, when she was discharged six weeks later, she immediately suspected her age to have been the reason. By that time, she claimed to have been told that Connie Ettefagh, the Director of Nursing Services at the Hospital, had said that she intended to get rid of that "old nurse." Moreover, Blumberg believed her replacement to have been Tricia Hartzoge, a woman in her 30's. Nevertheless, Blumberg delayed filing her charge of employment discrimination with the Equal Employment Opportunity Commission until May 23, 1984, 294 days after her dismissal.

According to Blumberg, her failure to act sooner was caused by her inability to locate an attorney willing to undertake representation of her claims. In September or October of 1983, she initially contacted an attorney who was not interested in pursuing the case. Later that year, she spoke with another attorney who advised her that she would have to go through the EEOC process and requested that she call him again once she had satisfied that requirement. Blumberg also made an appointment with a third attorney, but later cancelled that appointment because the lawyer's secretary had been "rather discouraging," advising her that discrimination cases were difficult to prove.

Despite the express recommendation that she comply with the EEOC procedures, Blumberg simply did nothing in regard to her claims until April, 1984, when she consulted her trial counsel. Even then, it was not until the end of the following month that she finally filed a charge of discrimination with the EEOC.

II. The Proceedings Below

On June 4, 1985, Blumberg and Lona Bell, a co-plaintiff, filed a complaint in the United States District Court for the Northern District of Texas, alleging that they had been discriminated against on account of their ages in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. In their answer, HMC and the Hospital asserted that Blumberg had failed to file a timely charge of employment discrimination with the EEOC and that her claims were therefore subject to dismissal.

Throughout the proceedings before the District Court, Blumberg acknowledged that the 180-day limitations period set forth in 29 U.S.C. § 626(d)(1) ap-

plied since no state deferral agency was in existence at the time that the allegedly discriminatory act had occurred. As her counsel expressly declared during the trial, "[T]he law is fairly clear that Texas was not a deferral state. That's all pretty well settled. It's just a question of whether she is entitled to this tolling that would make her claim timely or not."

The jury returned a verdict in favor of Blumberg and awarded her $54,284. The District Court overturned that award, finding that her EEOC charge had been untimely and that no basis existed for tolling that limitations period.

In her initial brief on appeal to the Court of Appeals for the Fifth Circuit, Blumberg noted that, "At the time of plaintiff's termination on August 3, 1983, Texas had no state agency for civil rights complaints and was therefore not a deferral state . . . Since Texas was not a deferral state at the time of plaintiff's termination, she only had 180 days to file her claim."

After HMC and the Hospital filed their brief citing *Mennor v. Fort Hood National Bank*, 829 F.2d 553 (5th Cir. 1987), Blumberg, in her reply brief, contended for the first time that she was entitled to the extended 300-day period within which to file a charge of discrimination with the EEOC. According to Blumberg, the establishment of a deferral agency, the Texas Commission on Human Rights, on September 23, 1983, several weeks after her discharge, prolonged the applicable limitations period.

On July 5, 1988, the Court of Appeals affirmed, ruling that the extended 300-day period was not applicable to Blumberg's claim. The Court found that her failure to raise the 300-day period until she filed

her reply brief barred consideration of the issue, and, in any event, since Blumberg had not shown that she had ever pursued her discrimination claims before the Texas Commission on Human Rights, she was not entitled to invoke the 300-day period. No basis existed for tolling the 180-day limitations period, and, accordingly, the EEOC charge filed by Blumberg was untimely.

A petition for rehearing was denied on August 1, 1988.

REASONS FOR DENYING THE WRIT

Resolution of the questions raised by the Petition would affect virtually no one other than the litigants in this action. Each of the issues involves a unique factual situation found to be determinative by the Fifth Circuit, and no significant legal matters were considered below. No conflict exists among the courts as to any of the questions raised, and nothing warranting review by this Court is presented by the Petition.

I. Blumberg Forfeited Any Claim To The Extended 300-Day Period

Contrary to the assertion in her Petition, Blumberg was not "deprived of the benefit" of *Mennor v. Fort Hood National Bank*, 829 F.2d 553 (5th Cir. 1987), simply because she failed to cite that decision in her original brief to the Fifth Circuit. In *Mennor*, the Court ruled that the extended 300-day period specified in Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(e), applied to discriminatory acts which occurred prior to the creation of the Texas Commission on Human Rights. Blumberg did not merely overlook the *Mennor* decision in her initial

brief. At no time prior to filing her reply brief had Blumberg suggested to the District Court or the Court of Appeals that the 300-day period was applicable. Instead, she conceded that the 180-day period set forth in 29 U.S.C. § 626(d)(1) governed her claim.

In ruling that Blumberg had waived any claim that the 300-day period was appropriate, the Fifth Circuit relied on the universally-recognized rule prohibiting consideration of issues raised for the first time in a reply brief. *See, e.g., Daggett v. Kimmelman*, 811 F.2d 793, 795 n.1 (3d Cir. 1987); *Wright v. Holbrook*, 794 F.2d 1152, 1156 (6th Cir. 1986); *United States v. Oakley*, 744 F.2d 1553, 1556 (11th Cir. 1984); *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983); *McCall v. Andrus*, 628 F.2d 1185, 1187 (9th Cir. 1980), *cert. denied*, 450 U.S. 996 (1981); *United States v. Bucchino*, 606 F.2d 590, 591 (5th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980); *United States Steel Corp. v. Train*, 556 F.2d 822, 839 n.23 (7th Cir. 1977); *United States v. Haldeman*, 559 F.2d 31, 78 n.113 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *Mississippi River Corp. v. Federal Trade Commission*, 454 F.2d 1083, 1093 (8th Cir. 1972). Where the applicability of a particular limitations period has not been properly raised by the parties, this Court has refused to consider whether that particular period should govern in deciding whether the claim was time-barred. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981). Only if the issue has been addressed in the trial court and asserted in the opening brief of the appellant is appellate review proper.

Here, Blumberg never contested the applicability of the 180-day limitations period before the District Court or in her initial brief on appeal. The Fifth Cir-

cuit was therefore correct in refusing to apply the 300-day period to her claims, and the Petition should be denied.

II. Blumberg Failed To Satisfy The Conditions Precedent To Filing Suit In A Deferral State

In their answers to Blumberg's complaint, HMC and the Hospital specifically denied that she had met the conditions precedent to filing suit under the ADEA. Thus, Blumberg had the burden of proving that she had satisfied the prerequisites to commencing an ADEA action. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). As she failed to offer any evidence at trial to demonstrate that she had pursued her remedies before the appropriate state agency, her claims are subject to dismissal even if Texas is considered a deferral state entitling her to the 300-day limitation period.

The EEOC charge upon which she relies was merely an exhibit to a summary judgment motion filed by HMC and the Hospital and was never introduced at trial. No evidence was presented at trial to show whether Blumberg had initiated proceedings before the Texas agency, and she cannot satisfy her burden of proving federal jurisdiction by relying on an exhibit to a pretrial motion.

Moreover, while that EEOC charge does mention the Texas Commission on Human Rights, nothing in the charge indicates that the EEOC was requested to transmit or in fact transmitted the charge to that agency. On the contrary, as the Fifth Circuit noted, in the section labelled "Charge Number(s) (Agency Use Only)," the block has been checked indicating that the filing was made with the EEOC and that

charge number 061-84-2276 was assigned. The block marked "State/Local Agency" was left blank and no state number listed, presumably showing that no filing with such an agency was desired.

As Blumberg failed to pursue her claims before the state agency, her action is subject to dismissal if the establishment of the Texas Commission on Human Rights renders the 300-day limitation period applicable. In those jurisdictions which have created deferral agencies, pursuit of state remedies is a prerequisite to suit under the ADEA. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979).

Although this Court in *Oscar Mayer* did permit an employee to satisfy the requirement that available state administrative remedies be exhausted while his federal litigation was held in abeyance, the parties in that case had not even commenced discovery at the time. Here, a full trial has been completed, and Blumberg was unable to meet her burden of proving that federal jurisdiction existed. Not only would this case have to be held in abeyance for her to pursue her state remedies at this time, but the trial record would have to be reopened in order for Blumberg to show that she is now willing to proceed with a charge before the Texas agency. *Oscar Mayer* does not compel such a result.

Even before a full trial has been completed, an employee who has filed an ADEA action in a deferral jurisdiction without having first invoked the available state remedial procedures need not be afforded an opportunity to satisfy that precondition to suit while the case remains pending. Depending upon the circumstances, the trial judge has discretion to hold the case in abeyance or dismiss it altogether. *See, e.g.*,

Smith v. General Scanning, Inc., 832 F.2d 96, 100 (7th Cir. 1987); *Cornett v. AVCO Financial Services*, 792 F.2d 447, 450 (4th Cir. 1986).

No abuse of discretion can be predicated on a dismissal after the trial has concluded without the deferral process having been commenced. More than five years after the allegedly discriminatory act occurred, Blumberg still has not complied with the conditions precedent to initiating an ADEA action in a deferral state, and she is not entitled to rely on the extended 300-day period applicable in such jurisdictions. The Fifth Circuit properly affirmed the dismissal of Blumberg's claims, and, accordingly, the Petition should be denied.

III. No Equitable Tolling Of The Limitations Period Is Proper

Despite being fully aware soon after her discharge of the evidence upon which she relied in presenting a *prima facie* case of discrimination, Blumberg contends that the limitations period should be extended until she possessed virtually all of the information she eventually presented to the jury. At the time of her discharge she immediately suspected age discrimination and consulted with at least one attorney whose advice that she file an EEOC charge she simply ignored.

HMC and the Hospital did nothing to mislead Blumberg concerning her rights, nor did they conceal any pertinent facts from her. Blumberg herself neglected her claim until it had become stale. No basis exists for tolling the 180-day limitations period, and Blumberg's charge was untimely. The Petition should therefore be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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